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OPINION | REVIEW & OUTLOOK

## *Texas ObamaCare Blunder*

A judge's ruling will be overturned and could backfire on Republicans.

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By The Editorial Board

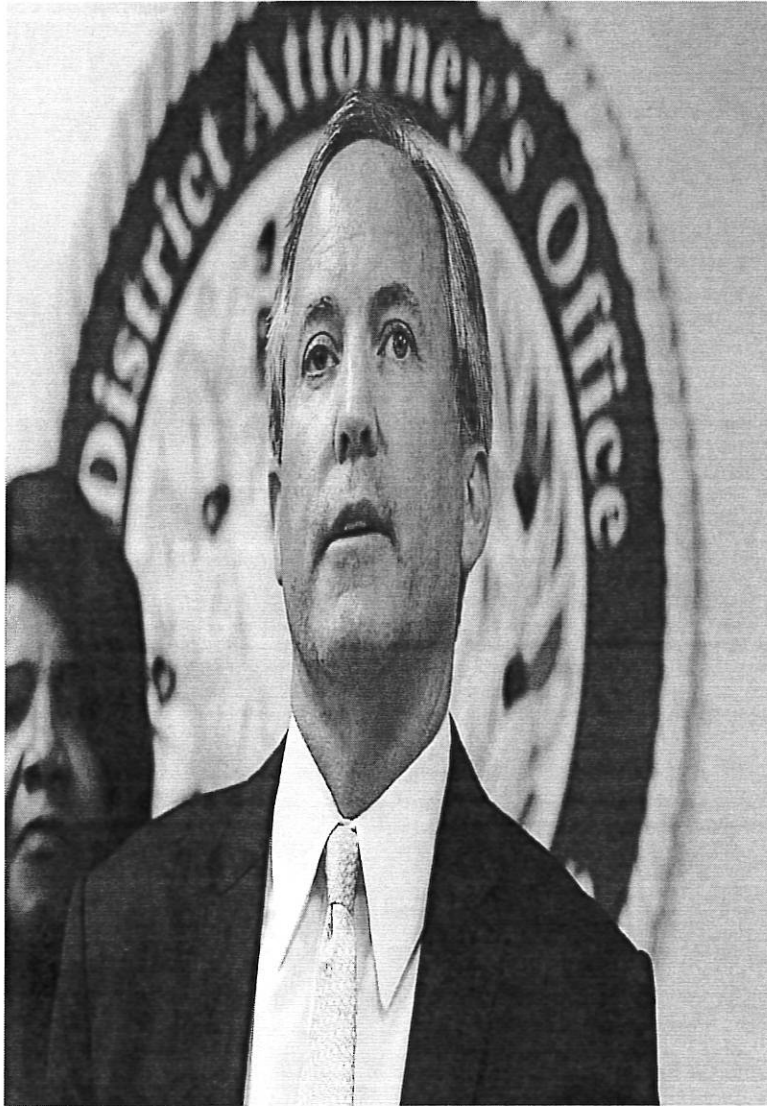
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No one opposes ObamaCare more than we do, and Democrats are now confirming that it was designed as a way-station to government-run health care. But a federal judge's ruling Friday that the law is unconstitutional is likely to be overturned on appeal and may boomerang politically on Republicans.

Judge Reed O'Connor ruled for some 20 state plaintiffs that the Affordable Care Act's individual mandate is no longer legal because Republicans repealed its financial penalty as part of the 2017 tax reform. Recall that Chief Justice John Roberts joined four Justices to say ObamaCare's mandate was illegal as a command to individuals to buy insurance under the Commerce Clause. "The Framers gave Congress the power to *regulate* commerce, not to *compel* it," he wrote.

Yet the Chief famously salvaged ObamaCare by unilaterally rewriting the mandate to be a "tax" that was within Congress's power. Never mind that Democrats had expressly said the penalty was not a tax. Majority Leader Roberts declared it to be so.

Enter Texas Attorney General Ken Paxton, who argues in *Texas v. U.S.* that since Congress has repealed the mandate, the tax is no longer a tax, and ObamaCare is thus illegal. Judge O'Connor agreed with that logic, and he went further in ruling that since



Texas Attorney General Ken Paxton PHOTO: TONY GUTIERREZ/ASSOCIATED PRESS

Congress said the mandate is crucial to the structure of ObamaCare, then all of ObamaCare must fall along with the mandate.

We'll admit to a certain satisfaction in seeing the Chief Justice hoist on his own logic. But his ruling in *NFIB v. Sebelius* was in 2012 and there is more at issue legally now than the "tax" issue in that opinion. One legal complication is that Congress in 2017 repealed the financial part of the individual mandate, not the structure of the mandate itself. Republicans used

budget rules to pass tax reform so they couldn't repeal the mandate's express language.

The Affordable Care Act has also been up and running since 2014, which means so-called reliance interests come into play when considering a precedent. Millions of people now rely on ObamaCare's subsidies and rules, which argues against judges repealing the law by fiat.

Judge O'Connor breezes past this like a liberal Ninth Circuit appeals judge handling a Donald Trump appeal. He's right that Democrats claimed the individual mandate was essential to the Affordable Care Act. But when Congress killed the financial penalty in 2017 it left the rest of ObamaCare intact. When judging congressional intent, a judge must account for the amending Congress as well as the original Congress.

In any case, the Supreme Court's "severability" doctrine calls for restraint in declaring an entire law illegal merely because one part of it is. Our guess is that even the right-leaning Fifth Circuit Court of Appeals judges will overturn Judge O'Connor on this point.

As for the politics, Democrats claim to be alarmed by the ruling but the truth is they're elated. They want to use it to further pound Republicans for denying health insurance for pre-existing conditions if the law is overturned. Democrats campaigned across the country against Mr. Paxton's lawsuit to gain House and Senate seats in November, and they will now press votes in Congress so they can compound the gains in 2020.

President Trump hailed the ruling in a tweet, but he has never understood the Affordable Care Act. His Administration has done good work revising regulations to reduce health-care costs and increase access, but the risk is that the lawsuit will cause Republicans in Congress to panic politically and strike a deal with Democrats that reinforces ObamaCare. This is what happens when conservatives fall into the liberal trap of thinking they can use the courts to achieve policy goals that need to be won in Congress.

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